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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Motion by Defendant in Error to Dismiss or Affirm, and Suggestions in Support Thereof.

MORSE IVES,
Attorney for Defendant in Error.

CHAMPLIN LAW PRINTING CO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 842

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Motion by Defendant in Error to Dismiss or Affirm, and Suggestions in Support Thereof.

Now comes the defendant in error, James B. Wilson, and moves that the writ of error in the above entitled cause be dismissed, or that the judgment of the court below be affirmed on the grounds, that the Appellate Court of Illinois was not the highest court of the state in which a decision of the suit could be had, and that the plaintiff in error reserved no federal questions for review, and that its respective contentions are foreclosed by previous decisions of this court and are frivolous.

Attorney for Defendant in Error.

SUGGESTIONS IN SUPPORT OF THE ABOVE MOTION.

James B. Wilson, on the 23rd day of August, 1913, was employed by the railroad company, now plaintiff in error, as a conductor of freight trains in interstate commerce. On that date, while in such employment, he was injured, and thereafter commenced a suit against the railroad company, his employer, in the Circuit Court of Cook county, Illinois, and filed his declaration, consisting of six counts, in one of which, the second (Trans. 5, 6), he alleged that the defendant negligently constructed a sidetrack unusually close to its main track at Peninsula, Ohio, so that it was dangerous for one to be between the main track and an engine passing upon the sidetrack; that the defendant knew of these dangerous conditions and he did not, and the defendant knew that he was ignorant thereof, and negligently failed to warn him of the unusually close proximity of said tracks. And in another count, the fifth (Trans. 10, 11), he alleged the violation by the defendant of the sixteen-hour law, and his injury thereby.

In support of the second count, it is shown that Wilson's usual work was over the Newcastle division of the defendant's road, running westward from Newcastle Junction, Pennsylvania, to Chicago Junction, Ohio; that the clearance upon this division, that is, the usual distance from cars standing upon main tracks to cars standing upon parallel side-

tracks, was about four feet or more (Trans. 42; Rec. 90), and he had never noticed any such distance of less than 3½ feet (Trans. 42; Rec. 91), and had not noticed such distances on any other division. Peninsula was between Cleveland and Akron on the Cleveland division. Wilson had run a train as conductor through Peninsula one trip, and at that time he did not notice anything about the distance the tracks were apart (Trans. 42; Rec. 91). The floods of the spring of 1913, several months previous to Wilson's injury, washed the ballast from under the tracks in Peninsula, and the sidetracks were washed down against main track (Trans. 91; Rec. 186). At that time the section foreman blocked up the tracks so they could run over them, and at the time Wilson was injured there was from one to two feet clearance between a car on the siding and a car on the main track there (Trans. 84, 71, 119). A brakeman passing between the engine standing on the siding there and the train turned his shoulders sideways to clear (Trans. 110; Rec. 225). They had been unloading slag there, and the condition of the roadbed or ground between the east rail of the main track and the west rail of the siding at that point was rough. The slag was there and hills and hollows (Trans. 110; Rec. 224).

At about 2 o'clock in the morning of August 23, 1913, Wilson, in charge of a train of 40 ore cars bound for points in Pennsylvania, arrived in Peninsula, and there was a "hot box" on the east side of the eighth car from the caboose, and for the purpose of setting this car out of the train he ordered one of the engines hauling the train to back north

upon the sidetrack parallel to and along the east side of the train. Wilson rode upon the west end of the footboard at the rear of the engine's tender. He carried a lantern, but it was dark and he could not observe any unusual distance or lack of distance between the engine and the train. Before he reached the "hot box" the engineer had shut off the power from the engine and the engine was "drifting" not over 5 or 6 miles an hour, just about an ordinary walk (Trans. 41; Rec. 89).

Wilson stepped off toward the "hot box" for the purpose of uncoupling that car from the train. The engineer saw his lantern strike a car and go out. He thought there was something wrong and stopped the engine, and Wilson was then found unconscious at the front of the engine.

In support of the fifth and other hours-of-service counts, the evidence shows that for 84 hours immediately before his injury, Wilson was devoting his entire time to the service of the defendant, as required by it, and by reason of its requirements he was able to obtain, during that period, but 4½ hours' sleep. Wilson lived at Newcastle, Pennsylvania. On August 19, 1913, he was called at 2:15 p. m. by the defendant to go west from Newcastle Junction on a train leaving at 4:15 p. m., for the purpose of relieving a train crew coming east (Trans. 27; Rec. 62). Under instructions from the defendant he was required to do preliminary work and be ready to leave at the time he was called to leave (Trans. 28; Rec. 64). On the 19th, Wilson reported at 3:40 p m. and performed such preliminary duties (Trans. 28; Rec. 65, 66), and then went to the station and waited.

The train was late. He left on it at 5:15 p. m. under directions to go until the conductor of that train would notify him to get off (Trans. 29; Rec. 67). He was ordered off at 6:05 p. m. at Ohio Junction, took charge of an east-bound freight train there and arrived at Newcastle Junction with his train about 2:45 a. m. following. He was then busy in incidental work for about 45 minutes, when he was ordered to go west on a freight train to meet another train coming east. He left Newcastle at 4 o'clock, was ordered off again at Ohio Junction, took charge of another east-bound train and reached Newcastle Junction with it at 10:55 a. m., August 20th, and then completing his work he left the yard for his home about 11:40 a. m. (Trans. 32; Rec. 72). From the time Wilson commenced work at 3:40 a. m. on August 19th, until he quit work at 11:40 a. m. on August 20th, he was on duty 20 hours. He reached his home at 12:05 p. m. on the 20th, ate his dinner and was getting ready for bed, when he was called by the defendant at 2:15 p. m. to again go west to again relieve a crew coming east. He reached the yard this day at 3:15 p. m. He did the same work he had done on the previous day and then again waited until the train left at about 5:15 p. m., upon which he rode to Akron Junction, 75 miles west of Newcastle, where the conductor told him to get off, and he took charge of a train there at 7:45 p. m., and reached Newcastle Junction with it at 9:10 o'clock the following morning August 21st (Trans. 34; Rec. 77), and he was busy registering at the roundhouse, getting his time slip signed, putting in his bills and wheel reports and registering at the

telegraph office and making extra reports, until 10:25 a. m. On this second trip, from the time he went to work on the 20th at 3:15 p. m. until he quit at 10:25 a. m. on the 21st, a period of 19 hours and 10 minutes had elapsed, and he had had no sleep since he left his house on the afternoon of the 19th, a period of about 44 hours. Upon his return from Akron on the 21st, he went home, ate his dinner, and went to bed about 1 o'clock and slept 2 hours. He was called again, at 3 o'clock and he arrived at Newcastle Junction at 4:25 p. m. (Trans. 35; Rec. 79) and was ordered to take charge of a train out of Newcastle Junction to Lorain, Ohio, and he was busy preparing for his departure until his train left at 6:30 p. m. He was all night with this train, reaching Warwick, Ohio, at 6:05 the next morning, August 22nd. He remained there in charge of his train until he was relieved as he testifies at 10 o'clock a. m. (Trans. 36; Rec. 80). He was "on duty" "connected with" this particular train 17 hours and 25 minutes. When relieved at Warwick he was ordered by the defendant to continue on this train and go to Cleveland, which he did under pay (Trans. 70; Rec. 144). There was no place for him to lie down (Trans. 37; Rec. 82). He arrived at Cleveland at 5:10 p. m., registered and got out of the yard at about 6:10, obtained supper, and went to bed in a caboose in the yard at 7:30. At that time, for the previous period of 77 hours, he had obtained just 2 hours' sleep. He then slept 2½ hours more until 10 o'clock that evening (Trans. 38; Rec. 84) when the defendant called him again, to take out a train from Cleveland. He commenced work at

once. He was sleepy and tired. Stumbling he bumped into the side of a car in the train and it woke him up. He had been dozing while walking along there (Trans. 39; Rec. 85). He was busy until his train left Cleveland at about 12:30 a. m. on August 23rd. On the road he tried to copy the numbers of the cars off his book onto the wheel report. The figures appeared double to him. He was afraid of going to sleep and went out on the rear platform of his caboose to keep awake (Trans. 39; Rec. 86). At Peninsula his attention was called to his condition while riding north on the running board just before he was hurt. A green tail light on the rear of the caboose appeared to him staggery, like two lights. He felt as if he could lie down on the footboard and go to sleep. In this condition he stepped off the footboard of his engine to uncouple the car with the "hot box" and was caught between the engine and the train, and injured.

There was a general verdict and judgment for the plaintiff. An appeal was taken by the defendant to the Appellate Court, First District of Illinois, and the judgment was there affirmed. The defendant did not ask for a certificate of importance in the Appellate Court or pray for an appeal there to the Supreme Court of Illinois. It petitioned the Supreme Court of Illinois for a writ of certiorari to the Appellate Court, which petition was denied, and a writ of error has been granted from this court to said Appellate Court.

Defendant in error contends:

That the Appellate Court of Illinois is not the highest court of the state in which a decision could have been had.

That no federal questions have been reserved in this case except such as are unsubstantial, frivolous and insufficient to give this court jurisdiction.

That the record in this case is free from error and that the judgment is so clearly right as to afford no reasonable ground for argument to the contrary.

I.

THE APPELLATE COURT OF ILLINOIS WAS NOT THE HIGHEST COURT OF THE STATE OF ILLINOIS IN WHICH A DECISION COULD HAVE BEEN HAD.

Section 121, chapter 110, Statutes of Illinois, provides as follows:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the constitution of the state to be allowed from the Appellate Courts to the Supreme Court, the judgments and decrees of the Appellate Court shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or any branch thereof shall be of opinion that any case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of the parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any

> such case as is hereinbefore made final in the said Appellate Courts, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court."

Section 11, article 5, Constitution of Illinois, provides that appeals and writs of error shall lie from the Appellate Courts to the Supreme Court "in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law." No law has provided for an appeal or writ of error in a case such as this other than section 121 above quoted.

The complete record (Trans. 162-169) discloses no certificate of importance denied by the Appellate Court, no application therefor, and no prayer for an appeal in that court.

In *Fisher* v. *Perkins*, 122 U. S. 522, under like circumstances, the court say (p. 526):

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused, its absence furnishes no ground for a writ of error from this court."

And further (p. 527):

> "As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. * * * The judgment is still the judgment of the Superior Court, which

> is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured."

Although the plaintiff in error took one and not the other of two courses open to it and filed its petition for certiorari in the Supreme Court of Illinois (Trans. 176), yet still the judgment against it might have been taken to the Supreme Court for review, "if the grant of an appeal had been applied for and secured." Everything was not done that could be done to take the case to the highest court of the state.

Gregory v. *McVeigh*, 23 Wall. 294.
Stratton v. *Stratton*, 239 U. S. 55.

It is certified by the presiding justice of the Appellate Court, that that court is the highest court of the state in which a decision in this case could be had (Trans. 191). However, that the certificate of the presiding justice cannot in itself "confer jurisdiction is too plain for controversy."

Consolidated Turnpike Co. v. *Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 335.

II.

NO FEDERAL QUESTION, SUBSTANTIAL AND NOT FRIVOLOUS, HAS BEEN RESERVED FOR REVIEW.

1. Assignments of errors one, two, three, four (Trans. 188) and eight (Trans. 190), simply allege in various forms that the Appellate Court erred in its decision of the cause. "These assignments may be summarily overruled upon the plain ground that they present no federal question."

Stickney v. *Kelsey*, 209 U. S. 419, 420.

2. Assignment five (Trans. 188, 189), that it was error to affirm the trial court in refusing to give peremptory instructions requested by the defendant at the close of plaintiff's evidence and at the close of all the evidence (Trans. 152), is without foundation, because the evidence accurately stated by the Appellate Court (Trans. 186) in support of the second count (Trans. 5, 6) shows, if not negligence as a matter of law proximately contributing to plaintiff's injury, beyond controversy a question of fact for the jury. Contributory negligence under the statute is no defense other than in reduction of damages, and there is no evidence tending to show assumption of risk.

In its petition for a writ of certiorari in the Supreme Court of Illinois, the plaintiff in error alleged error respecting only the hours of service ground of liability (Trans. 176-185). It made no claim that a verdict should have been directed as to the second count of the declaration. It therefore waived or abandoned the right to make such claim now. *Hulbert* v. *Chicago,* 202 U. S. 275, 281. If this were not so, while it is necessary to petition the Supreme Court of a state before an Appellate Court can be said to be the highest court in which a decision could be had, such petition might, withholding substantial grounds, allege unfounded reasons only. And a litigant in an effort to obtain a decision of the Supreme Court of the United States, might petition for a writ of certiorari in the Supreme Court of a state, yet seek not to obtain it, and thereupon the jurisdiction of this court would depend upon the form and not the substance of such proceeding.

3. Assignment six (Trans. 189), that the Appellate Court erred in affirming the trial court's refusal to give instruction No. 27, as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the hours-of-service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury"

reserves no question for review, because:

(a) The defendant itself "at the same time" (Trans. 158; Rec. 328) it submitted instruction No. 27 tendered its fifteen other given instructions and by its instructions 19 and 20 (Trans. 157) presented to the jury the violation of the Hours of Service Act as a question of fact, and by instruction 16 it presented to the jury the question of proximate connection between such violation and plaintiff's injury.

Philadelphia, W. & B. R. Co. v. *Howard,* 13 Howard, 307, 343, 344.

Hartford Life Ins. Co. v. *Unsell,* 144 U. S. 439, 451.

Little Rock & M. R. Co. v. *Moseley,* 56 Fed. Rep. 1009; 6 C. C. A. 225.

W. C. St. R. R. Co. v. *Foster,* 175 Ill. 396.

Woods v. *Dailey,* 211 Ill. 495, 498.

The defendant merely afforded the court a choice between inconsistent instructions.

(b) Instruction No. 27, by its terms, in effect directs a verdict as to the hours-of-service counts,

and its refusal was harmless error under the state practice, if there was any good count in the declaration which the evidence tended to support.

Scott v. *Parlin & Orendorff Co.*, 245 Ill. 460.
Heidenreich v. *Bremner*, 260 Ill. 439, 445, 446.

(c) The defendant took but one general exception to the refusal of six separate instructions of which No. 27 was one (Trans. 158; Rec. 331), and made no special claim or exception as to any one of them; thus, under the federal practice it saved nothing for review.

Holloway v. *Dunham*, 170 U. S. 615, 619.
Union Ins. Co. v. *Smith*, 124 U. S. 405, 424.
Norfolk & Western Ry. Co. v. *Earnest*, 229 U. S. 114, 122.

(d) There was evidence plainly tending to show that the violation of the hours-of-service act contributed to plaintiff's injury.

4. Assignment seven (Trans. 189, 190), that the Appellate Court erred in holding the trial court did not err in giving to the jury the following instruction:

> "The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an Act of the Congress of the United States, enacted for the safety of employes of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it is provided in this Act that the term 'employe' as used in this Act shall be held to mean 'persons actually engaged in or connected with the move-

ment of any train'; and it is further provided in said Act that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.

"The jury are instructed that if you find from a preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train, as charged in the plaintiff's declaration, or some count hereof, and that the plaintiff as a proximate result of such violation of said Act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case"

reserved no question for review, because:

(a) The defendant in the trial court specially set up or claimed nothing erroneous in this instruc-

tion or any part of it, but excepted generally to the giving of six instructions, of which this was one (Trans. 155; Rec. 311), and in the Appellate Court assigned error generally in the giving of all instructions on behalf of plaintiff (Trans. 161; Rec. 337). And the Appellate Court decided generally that there were no reversible errors in the instructions (Trans. 187), but did not deny, as far as it appears, any Federal right specially set up or claimed. In the petition for certiorari to the Supreme Court of Illinois appears for the first time a particular claim of error in this instruction (Trans. 184), viz.: that it "permitted the jury to overrule the legislatively declared judgment of Congress that ten hours off duty is a legally sufficient intervention to break the causal connection between previous overwork and subsequent injury," and this contention is plainly without foundation, because the Act provides for ten hours' rest when the limit, 16 hours on duty, is reached. There is no relationship presented between ten hours' rest and other periods on duty in excess of sixteen hours. It is not contemplated by the Act that ten hours' rest following thirty or forty or more hours on duty renders a railroad company immune from government prosecution or civil liability for the law's violation.

(b) The defendant itself submitted to the jury the same matter complained of in this instruction by its given instructions 16, 19 and 20 (Trans. 157).

(c) This instruction is a correct statement of the law applicable to the facts in the case.

III.

THE UNDISPUTED FACTS OF THIS CASE ESTABLISH NOT ONLY LIABILITY UNDER THE SECOND COUNT OF THE PLAINTIFF'S DECLARATION, BUT, AS CONTRIBUTING TO PLAINTIFF'S INJURY, A FLAGRANT VIOLATION OF THE SIXTEEN-HOUR LAW.

Wilson performed no duties for the defendant except as a conductor of freight trains.

He was not at all times "actually engaged" in "the movement of any train," but when not so engaged he was "connected with" such movement. And after he reported for duty on the 19th and 20th of August, and while performing preliminary work and while riding west until he should be ordered off to meet each train coming east, he was under pay, "under orders, liable to be called upon any moment and not at liberty to go away."

M. K. & T. Ry. Co. v. *United States*, 231 U. S. 112, 119.

Likewise, on August 22nd, on his trip from Warwick to Cleveland, he was under a specific order, under pay, where he could obtain no sleep and not at liberty to go away. So that from 2:45 p. m., on August 19th, until 2:30 a. m. on August 23rd, for a period of 84 hours, he was able to obtain but 4½ hours' sleep.

United States v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629.

United States v. *Kansas City Ry. Co.*, 189 Fed. Rep. 471, 475, 478.

United States v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783, 785.

Lamphere v. *Ore. R. & N. Co.*, 196 Fed. Rep. 336, 338.

At the time of his injury, Wilson was actually engaged in the movement of a train, and the purpose of the statute cannot be defeated by requiring long periods of service through other requirements of the carrier, "or by the commingling of duties relating to interstate and intrastate operations."

Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612, 619.

San Pedro, L. A. & S. L. R. Co. v. *United States*, 213 Fed. Rep. 326, 328.

Great Northern Ry. Co. v. *United States*, 211 Fed. Rep. 309, 312, 313.

Plaintiff in error, however, relies on the ruling of the Interstate Commerce Commission issued April 1, 1911, as follows:

> "Hours of Service Law. Employes deadheading on passenger trains or on freight trains, and not required to perform, and not held responsible for the performance of any services or duty in connection with the movement of the train upon which they are deadheading, are not, while they are so dead-heading, 'on duty' as that phrase is used in the act regulating the hours of labor."

If this ruling be deemed applicable to such facts as this case presents, it is irreconcilable with the decisions of this Court and the decisions of the lower Federal courts above cited; for there is no differ-

ence that has any legal significance, between Wilson traveling under specific orders on a moving train, waiting for the next order to come, than if he were waiting upon a station platform or elsewhere.

The 4½ hours' sleep is not important for if the statute be applied as defendant claims it should be a conductor or an engineer may be employed indefinitely without any sleep and then be sent forth in charge of a train, a source of the gravest danger to himself and the passengers and crews of his own and all other trains along the line.

The trial court, however, ruled with the defendant, and limited by defendant's instruction 19 (Trans. 157) plaintiff's right to ecover, if at all, under the charge of a violation of the sixteen-hour law, to the single trip from Newcastle Junction, Pennsylvania, to Warwick, Ohio, during August 21st and 22nd, upon which trip Wilson, according to his testimony, was actually engaged in or connected with the movement of a train for 17 hours and 25 minutes.

If this ruling be wrong it affords no advantage to the plaintiff in error now. If it be right it is pertinent only on the question of proximate connection between the violation of the statute on the trip to Warwick and plaintiff's exhausted condition at the time of his injury.

Wilson's condition was naturally due to the prolonged period of work and sleeplessness. The time of the trip to Warwick was a part of that period. The whole period cannot be divided into parts and

it then be said that any one part did not contribute to the whole. So if the statute in its application be thus limited it still has scope and strength enough left to destroy the logic of defendant's proximate cause contention.

Respectfully submitted,

MORSE IVES,
Attorney for Defendant in Error.

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THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES B. WILSON,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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[illegible] PRINTING COMPANY, CHICAGO.

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IN ERROR TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

STATEMENT OF FACTS.

This action was for personal injuries sustained by the defendant in error at Peninsula, Ohio, about 2 A. M., August 23, 1913.

There was a verdict and judgment in the Circuit Court of Cook County, Illinois, against the plaintiff in error for $45,000, which was affirmed by the Appellate Court of Illinois, First District.

A petition for a writ of certiorari was refused by the Supreme Court of Illinois, and thereupon the case was brought to this court by writ of error.

The declaration consists of five original counts (Trans., 2-11) and one additional count. (Trans., 13-15.)

All of the counts allege the engagement of the plaintiff in error in interstate commerce and the employment of the defendant in error by it as a freight conductor. All of the counts predicate liability upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L., 65, Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended April 5, 1910 (35 Stat. at L., 291, Chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324).

The first and third counts were taken from the consideration of the jury by peremptory instructions given by the trial court. Three of the other four counts set out in minute detail the alleged exact hours when the defendant in error went on and off duty on the 19th, 20th, 21st, 22nd and 23rd days of August, 1913, and each avers the violation of the Federal Hours of Service Act in that respect so that (Trans., 14) by reason of such violations by the plaintiff in error the defendant in error became nervous and exhausted, his senses dulled, his judgment impaired; and that while he was in such condition, shortly after midnight on the 23rd day of August, 1913, he was required and permitted by the plaintiff in error to take charge of a freight train bound from Cleveland, Ohio, to New Castle Junction, Pennsylvania; that the defendant in error accordingly took charge of such train, and had proceeded as far as Peninsula, Ohio, where the train was brought to a stop, standing upon the main track; that in order to take out from such train a hot box car the defendant in error caused an engine to be detached from said train and to be backed in and along

a sidetrack for the purpose of reaching the other end of the train, preliminary to taking out the hot box car; that this sidetrack was immediately adjoining the main track upon which the train was standing; that as the engine backed in upon the sidetrack the defendant in error rode upon the footboard of the tender, and upon the side of the footboard closest to the train, and that as the engine approached the point in said train where the hot box car was located, the defendant in error then and there, by reason of the several violations of the Federal Hours of Service Act, and by reason of his nervous and exhausted condition, as aforesaid, was unable to protect himself from injury, and stepped off from the footboard of the engine toward the train, and between the tracks; that he then and there struck against one of the cars of the train, and was thrown back under and against the moving engine, and as a direct result of the several violations of law aforesaid he was greatly injured.

The second count of the declaration makes no reference to "hours on duty" by the defendant in error, prior to the trip upon which he was injured, but avers negligence upon the part of the plaintiff in error "in constructing a certain sidetrack there unusually close to said main track." This count does not contain any averment that the defendant in error was in the exercise of ordinary care at and prior to the time of his injury; and under this second count the meaning and application of the Hours of Service Act are necessarily involved, for the reason that defendant in error's instruction No. 1 charged the jury that if any violation of the Hours of Service Act "proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of plaintiff at all in determining the amount of plaintiff's damages, if any, in this case" (Trans., 153); and for the further reason

that defendant in error's instruction No. 2 charged the jury that in suits brought under the Employer's Liability Act because of any "defect or insufficiency due to its negligence in its * * * track, roadbed," etc., no employee shall be held to have been guilty of contributory negligence or to have assumed the risk of his employment "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury of such employee."

The defendant in error, at the time of his injuries, was 29 years of age. He had entered the service of the plaintiff in error as a brakeman in 1907, and had been promoted to the position of a conductor some three or four months prior to the time of his injuries. His services had been upon what was known as the Newcastle and Cleveland Divisions. He was injured at Peninsula, a station on the Cleveland Division, about 2 A. M. on the morning of August 23rd.

Through the Village of Peninsula there is a single main track running in a general north and south direction. Just north of the station are two sidetracks lying immediately east of and parallel with the main track. The main track and the passing siding next to same were built in 1878 or 1879, and were then constructed upon what are called twelve-foot centers. (Trans., 21.) In April, 1913, what were known as the "Ohio floods" interfered with the use of these tracks for some sixteen or eighteen days, and after the floods subsided, the tracks were relaid practically as before, although the alignment was not quite as good. (Rec., 54; Trans., 21.)

On August 19, 1913, defendant in error as a conductor was directed to go west from Newcastle Junction on what was known as the mail train, to relieve the crew of an eastbound train. He accordingly left Newcastle Junction

on such mail train at 5:19 P. M. and rode 25 miles to Ohio Junction, where he was directed to get off and take charge of an eastbound freight train which he was to relieve, and which was known as "Extra Engine 4057 east." He left Ohio Junction in charge of this train, at 11:03 P. M., and arrived at Newcastle Junction at 1:10 A. M. on the morning of the 20th. He was relieved from further duty at 2:43 A. M. the same morning. (Rec., 302; Trans., 150.)

The defendant in error had been called to report for duty at 4:15 P. M., the time at which the mail train was due to leave. It was, however, late, and did not leave until 5:19. While riding upon this train, although under pay, he was not considered as "on duty," and had no responsibilities or duties to perform with reference to that or any other train. (Rec., 116; Trans., 55.)

The defendant in error was again called to go west on freight train 97, and relieve another crew coming east. Upon this second trip, he left Newcastle Junction at 4:03 A. M., August 20th, and arrived at Ohio Junction at 5:11 A. M. He left Ohio Junction in charge of eastbound freight "Extra Engine 4088" at 6:10 A. M., and arrived at Newcastle Junction at 10:40 A. M., the same morning, and was relieved from duty ten minutes later. (Rec., 302; Trans., 150.)

While riding on this freight train No. 97, he was again "deadheading" and had no responsibility with reference to the movement or management or control of the train. (Rec., 117; Trans., 56.)

About 2:15 P. M., on August 20th, the defendant in error was notified that he should again deadhead on the mail train west from Newcastle Junction and take charge of another eastbound freight. The mail train in question left Newcastle Junction at 5:12 P. M., carrying de-

fendant in error as far as Akron Junction, Ohio, where he arrived at 7:33 P. M. At that point defendant in error took charge of an eastbound freight train drawn by engines 4044 and 4042, leaving there at 12 o'clock midnight and arriving again in Newcastle Junction at 9:05 A. M., August 21st, at which time he was again relieved. (Rec., 302; Trans., 151.)

The defendant in error's next move was to start from Newcastle Junction at 5:30 P. M. (Rec., 123; Trans., 59), with a train for Lorain, Ohio. The next morning, August 22nd, defendant in error had arrived in charge of this train at Warwick, Ohio, at 6:05 A. M. At this point he was notified about 8 o'clock A. M. that he in turn would be relieved by another conductor. (Rec., 124; Trans., 60.)

Defendant in error testified to the time of his being relieved from duty at Warwick, as follows:

"Q. And what time were you relieved?
A. Ten o'clock.
Q. And who relieved you?
A. John Stewart.
Q. Where was your train? How far from the depot there?
A. Two miles.
Q. Two miles west of the depot?
A. Yes, sir.
Q. Do you know what time Stewart got into Warwick that morning?
A. Stewart went by me; the train he was on went by where I was about 8:40.
Q. And how did Stewart get out to where you were?
A. He walked.
Q. And where were you when he reached you?
A. I was over at the telephone.
Q. At the west end of the siding?
A. Yes, sir.
Q. You were near the engine of your train?
A. Yes, sir; right near the engine.

Q. And that was about 10 o'clock?
A. He came there about 10.
Q. Did you make a record of the time you were relieved there that morning?
A. Not at Warwick.
Q. Did you make a record later?
A. Yes, sir.
Q. And when?
A. We made a record on the way to Cleveland at 8:45.
Q. Who was with you when you made your record?
A. Stewart.
Q. Stewart, the conductor that relieved you?
A. Yes, sir.
Q. And what time did you record as the time you were relieved?
A. Ten o'clock.
Q. Did you make a record in your book of the time you were relieved?
A. 8:45." (Rec., 80, 81; Trans., 36, 37.)

The conductor who relieved him, S. M. Stewart, testified that such relief occurred at 8:45 A. M. (Rec., 290; Trans., 145.)

Stephen O. Lewis, the engineer of the train from Newcastle to Warwick, testified to being relieved at 8:45 A. M. (Rec., 278; Trans., 138.)

Hiram Cearfos, brakeman upon the same train, testified to the relief time as between 8 and 9 o'clock in the morning. (Rec., 220; Trans., 108.)

Conductor Stewart made an entry at the time in his "Conductor's Train Record" showing that he relieved defendant in error at 8:45. He also at the same time made an endorsement upon the back of his time slip, to having relieved Conductor Wilson at 8:45 A. M. (Rec., 293, 294; Trans., 146.) (Through error in printing the record herein this last exhibit does not show the endorsement upon the back of the time slip.) The train sheets of the plaintiff in error made up by its train dispatcher

received from telegraphic reports received from telegraph operators also gave the time of relief as 8:45 A. M. (Rec., 303; Trans., 151.)

The relief crew, under Conductor S. M. Stewart, came upon a passenger train running in the opposite direction to that in which defendant in error Wilson's train was heading. This passenger train stopped at coal tipple (located between where Wilson's engine was standing upon the sidetrack and the station to the east) about a hundred car lengths east of defendant in error's engine. Conductor Stewart and the other members of the relief crew got off from the passenger train at this coal tipple and walked from there to defendant in error Wilson's train. (Rec., 279; Trans., 139.)

After being relieved at Warwick the defendant in error and other members of his crew deadheaded upon the same train to Cleveland, arriving there at 5:10 P. M., August 22nd. Later in the evening the defendant in error was notified that he was to take a train from Cleveland to Akron. He left Cleveland in charge of this train about 12:30 A. M., on the morning of August 23rd. The train consisted of forty cars and a caboose drawn by two engines. It stopped at Peninsula on the main track to take water for the engines. Some four or five miles before Peninsula had been reached, the defendant in error discovered two hot box cars in the train. At Peninsula, one of these hot box cars was fixed, but it was determined to set the other hot box car out of the train.

In pursuance of this plan, the defendant in error caused one of the engines to be detached and backed upon the sidetrack along the side of the train. Defendant in error himself rode upon the rear footboard (forward end of engine in direction of movement) standing

upon the end thereof next to the main track upon which his train was standing. As the engine proceeded backing on the sidetrack, the defendant in error, although he had a lantern, did not give any stop or slow signal or signals of any kind. (Rec., 138; Trans., 67.) The speed of the backing engine was variously estimated by the witnesses at from five or six to eight or ten miles per hour.

When the backing engine arrived opposite the place in the train where the hot box car was, the defendant in error got off between the engine and the cars; the last thing he remembered was stepping down off the footboard with his left foot, but whether that foot ever reached the ground, he did not know. (Rec., 143; Trans., 70.) The engineer of the backing engine saw what he termed some mismove of defendant in error and his lantern, and stopped as quickly as he could. The defendant in error, Wilson, was found just at the front of the engine, injured. (Rec., 265; Trans., 131.)

The defendant in error, Wilson, knew nothing of the distance or space between the main and passing siding at Peninsula. (Rec., 90; Trans., 42.) His testimony as to his physical condition at the time can best be shown by his actual testimony, and we quote from the record as follows (Trans., 39):

"Q. What was your condition at that time, Mr. Wilson, that is between the time you were called and the time you left Cleveland that night?

A. I was awful sleepy and tired.

Q. Was there anything there in the yard that night that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. When I was coming from the caboose down to the yard office the head brakeman and I were walking along between the train I had in there and another one that they had brought in later, between

the two tracks, and we were walking along there, and I stumbled and bumped into the side of a car in the train I brought in, and it woke me up. I had been dozing and walking along there.

Q. And after you left Cleveland did you do anything in connection with your train there?

A. Yes, sir.

Q. What did you do?

A. I had my book with the numbers of the cars on. The wheel report did not have any numbers on it. I was trying to copy the numbers off the book on to the wheel report, and when I would look down at the book to get the numbers, it looked as though there was two numbers. I couldn't get them. It was double. I had a meet order for an extra.

Q. What do you mean by a 'meet' order?

A. A meet order to meet an extra train coming in the opposite direction, and I knew I didn't dare to sit there or I would go to sleep. I had to keep awake.

Q. Did you fill out your report?

A. No, sir; I couldn't finish it. I started to do so when I was marking the report down, and I couldn't keep awake, and I went and rode on the rear platform of the caboose. * * * (Trans., 41.)

Q. What was your condition—that is, when you were riding north on that running board?

A. I was awful sleepy and tired.

Q. Was there anything at that time that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. I could see the tail light on the rear end of the caboose. It was green. From the direction I was looking at it, I looked at it and it looked like two lights, staggery-like, like two lights, and I knew there was only one. My eyes seemed blurred. I felt I could lay right down on that footboard and go to sleep.

Cross-Examination (Trans., 63).

Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you

stumbled or bumped against some other cars on the way down?

A. I bumped up against the car, run into the side of the cars.

Q. That was on your way down to the roundhouse?

A. That was on my way down to the yard office.

Q. To the yard office? And that was the time that you noticed that you were sleepy also?

A. Yes, sir.

Q. That was before you had registered out or taken any train at all?

A. That was after I was called. That was while I was going down.

Q. After you were called and on your way down to the yard office?

A. Yes, sir.

Q. Who did you see at the yard office when you got down there?

A. I saw the yardmaster.

Q. Saw the yardmaster?

A. And the clerk.

Q. And the clerk. Did you say to either of them anything about the fact that you were sleepy?

A. No, sir.

Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?

A. No, sir.

Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?

A. I asked the yardmaster for a pilot, that was all?

Q. For a pilot?

A. Yes, sir.

Q. You told him nothing about feeling tired nor sleepy?

A. I did not.

Q. Told him nothing about having stumbled even?

A. No, sir.

(Trans., 70.)

Q. You do not know whether you struck the side of this car or did not strike it, do you?

A. No, sir.
Q. You do not know whether you slipped or stumbled, do you; you have no knowledge as to that?
A. I know I did not slip or stumble.
Q. What is it?
A. Off of the footboard.
Q. No, but on the ground.
A. I do not remember after that.
Q. Your last recollection is at the time that you stepped down?
A. Off the footboard.
Q. Did you step with your left or right foot first?
A. I stepped with my left.
Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?
A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?
A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, you don't know?
A. I don't know."

Under the uncontradicted evidence and under instruction 19 (Trans., 157), the only question as to any violation of the Hours of Service Law is whether plaintiff was relieved on August 22, at 8:45 A. M. (as testified by several witnesses) or at 10 A. M. (as testified by defendant in error).

If it be assumed that the jury accepted the statement of defendant in error and rejected that of the other witnesses, then the only violation of the act was permitting the defendant in error to remain in charge of his engine (which stood on a sidetrack waiting for the relief crew) from 9:30 A. M. (when the sixteen hours on duty expired) until 10 A. M.—a thirty-minute violation sixteen hours prior to the time of injury.

Assuming, for argument's sake, that defendant in error was not relieved until 10 A. M., at Warwick, on the morning of August 22, he did not again resume duty until 12 o'clock midnight of the same day, a period of fourteen hours. This was four hours more off duty time than the statute required. Notwithstanding this lapse of fourteen hours off duty time, and the fact that the defendant in error, when he took charge of the train at Cleveland at midnight, was again under the statute eligible for duty, the trial court gave to the jury the defendant in error's instruction No. 1, which is as follows:

> "The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an act of the Congress of the United States, enacted for the safety of employees of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it provided in this act that the term 'employe' as used in this act shall be held to mean 'persons actually engaged in or connected with the movement of any train'; and it is further provided in said act that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted to again go on duty until he has had at least ten consecutive hours off duty.
>
> The jury are instructed that if you find from a preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22nd, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the move-

ment of a train, as charged in the plaintiff's declaration, or some count thereof, and that the plaintiff as a proximate result of such violation of said act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to the plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case." (Rec., 306; Trans., 152.)

The defendant in error excepted to the giving of the above instruction, and now claims that the court by the giving of said instruction advised the jury that if they found that on the previous trip the plaintiff in error had been required to or permitted by the defendant in error to work for more than sixteen hours consecutively in connection with the actual movement of his train, and that as a result in whole or in part thereof he was injured, that then the contributory negligence of the defendant in error should not be considered by the jury either in passing upon the question of whether the plaintiff in error was negligent or guilty, and, if so, in determining the amount of the damages to be paid by it therefor to the defendant in error.

The record thus presents the question:

(a) May a trainman engaged in interstate commerce and injured by reason of his exhausted condition brought about by his having on a previous occasion been permitted to remain on duty in violation of the Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for

such injuries, if at the time of receiving same his then being on duty was not a violation of the Federal Hours of Service Act?

The record contains no evidence whatever which in any way connects the claimed thirty minute violation of the Hours of Service Act at Warwick on the morning of August 22nd with the injuries sustained by the defendant in error some sixteen hours later at Peninsula, Ohio. This raises another question:

(b) May a violation of the Hours of Service Act as to time "on duty" antecedent to the period of service on which an injury was received, and separated from it by a longer period of time "off duty" than the Hours of Service Act requires, be held to be the proximate cause of such injury?

The above question was also raised by the refusal of the court to give plaintiff in error's instruction number 27, reading as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the hours of service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury." (Rec., 329; Trans., 158.)

The tired and exhausted condition of the defendant in error at the time he took charge of the train at Cleveland at midnight on August 23rd was fully known to the defendant in error, but unknown to the plaintiff in error.

The giving of defendant in error's instruction number 1, above set out in full, and the giving of defendant in error's instruction number 2 (Rec., 308; Trans., 153) presents another question:

(c) May an interstate carrier permit an employee who has been on duty continuously for more than 16 hours, again to go on duty after having more than 10 consecutive hours off duty, when any disability which said employee may have suffered by reason of having on the previous trip been on duty more than 16 hours is unknown to the employer?

The giving of defendant in error's instructions numbers 1 and 2 presents the further questions:

(d) In a suit by a trainman engaged in interstate commerce for injuries received by reason of his exhausted condition brought about by having been permitted on a previous trip to be continuously on duty more than sixteen hours, and where, since the trip on which said violation of the Hours of Service Act occurred, the employee has been given more than ten consecutive hours off duty, may the court eliminate defenses of contributory negligence and assumed risk by instructing the jury that the *violation on said previous trip* suspends the operation of the doctrines of contributory negligence and assumed risk *on a subsequent trip* on which the injury occurred;

(e) In such a case may the court submit to the jury the question whether the "ten consecutive hours off duty," provided by the Hours of Service Act, was or was not a sufficient length of time to break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowledge of the employee's exhausted condition when resuming work after the expiration of more than "ten consecutive hours off duty."

In the construction placed by the court upon the Hours of Service Act in the giving of defendant in error's instruction number 1, a further question is presented:

(f) In a suit by a trainman engaged in interstate

commerce for injuries received by reason of his exhausted condition brought about by his having been permitted on a previous trip to be continuously on duty more than sixteen hours, and where since the termination of the trip upon which the violation occurred he has been given ten hours or more "off duty" time, as required by the Hours of Service Act, may the court submit to a jury the question whether the "off duty" time so given was or was not sufficient to break the causal connection between the exhausted condition brought about by reason of the overtime violation on the preceding trip and the injuries sustained in the succeeding trip.

The plaintiff in error herein (defendant below) at the close of the plaintiff's case in the trial court, tendered to that court in writing the following motion and instruction (Rec., 237; Trans., 116-117):

> "Comes now the defendant in the above-entitled cause, by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to give to the jury a written instruction in the following form:
>
> 'The court instructs the jury to find the defendant not guilty.'"

and at the close of all of the testimony tendered in writing the following motion and instruction:

> "Comes now the defendant in the above-entitled cause by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence on behalf of both the plaintiff and the defendant, and moves the court to give to the jury a written instruction in the following form:
>
> 'The court instructs the jury to find the defendant not guilty.'"

both of which motions were refused by the trial court, and exception was duly taken by the defendant below.

ERRORS RELIED UPON.

The errors now assigned are recited in full upon pages 188 to 190 exclusive of the Transcript of Record. They include the following:

1. The Appellate Court of Illinois, First District, erred in affirming the judgment of the Circuit Court of Cook County rendered herein.

2. The Appellate Court of Illinois, First District, erred in denying the petition of the plaintiff in error herein for a rehearing in said cause.

3. The Appellate Court of Illinois, First District, erred in refusing to reverse the judgment of the Circuit Court of Cook County and to remand the case to that court for a new trial.

4. The Appellate Court of Illinois, First District, erred in refusing to hold that the Circuit Court of Cook County should have granted the motion of this plaintiff in error for a new trial.

5. The Appellate Court of Illinois, First District, erred in holding that the Circuit Court of Cook County did not err in overruling the motions of this plaintiff in error for peremptory instructions, and in marking "Refused" the written instructions tendered with each of said motions.

6. The Appellate Court of Illinois, First District, erred in holding that there was no error on the part of the Circuit Court of Cook County in refusing instruction No. 27, tendered by plaintiff in error, and reading as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the Hours of Service Law proximately caused or contributed

to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury."

to which charge this plaintiff in error, the defendant below, duly objected and excepted, based upon the terms and provisions of the Act of Congress entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes therein," approved March 4, 1907, and commonly known as the Federal Hours of Service Act, the benefit of the terms and provisions of which said act this plaintiff in error then claimed and now claims.

7. The Appellate Court of Illinois, First District, erred in holding that the trial court did not err in giving to the jury plaintiff's instruction No. 1, reading as follows:

"The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an Act of the Congress of the United States, enacted for the safety of employes of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it is provided in this Act that the term 'employe' as used in this Act shall be held to mean 'persons actually engaged in or connected with the movement of any train'; and it is further provided in said Act that it shall be unlawful for any common carrier, its officers or agents, subject to this Act, to require or permit any employe subject to this Act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.

The jury are instructed that if you find from a

preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train, as charged in the plaintiff's declaration, or some count thereof, and that the plaintiff as a proximate result of such violation of said Act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the Act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case."

to which charge the plaintiff in error, the defendant below, duly objected and excepted, based upon the terms and provisions of said act in said charge mentioned, the benefit of which the plaintiff in error then claimed and now claims.

8. The Appellate Court of Illinois, First District, erred in refusing to hold that the Circuit Court of Cook County should have granted the motion of plaintiff in error in arrest of judgment.

BRIEF.

I.

THE DISABILITY OF THE DEFENDANT IN ERROR TO PERFORM THE DUTIES OF HIS DANGEROUS OCCUPATION WITH A DEGREE OF CARE COMMENSURATE WITH THE HAZARDS OF THAT OCCUPATION, AND WHICH DISABILITY WAS KNOWN TO HIM AND NOT COMMUNICATED TO HIS EMPLOYER, DEFEATS RECOVERY, UNLESS AT THE TIME OF HIS INJURY THE VERY FACT OF HIS THEN BEING ON DUTY WAS A VIOLATION OF THE HOURS OF SERVICE ACT.

In view of the testimony of the several witnesses produced by the plaintiff in error to the effect that the defendant in error was relieved at Warwick at 8:45 o'clock on the morning of August 22nd, and the fact that the defendant in error himself made a written record to such relief as being at 8:45 A. M. (Rec., 81; Trans., 37) it is felt that his verbal contradiction of such record should be rejected *in toto*, and that there was in fact no violation at Warwick of the Federal Hours of Service Act.

However, assuming that the defendant in error was not relieved until 10 o'clock A. M., it then appears that his injury occurred more than 16 hours thereafter, and that between the time of such violation and of the injury, there was a period of "off duty" of more than 10 hours.

There has never been any claim on the part of the defendant in error, that his being at work at the time of his injury was in and of itself a violation of the Hours of Service Act. The plaintiff in error could not have

been subjected to a penalty in a proceeding brought against it by the United States because of the fact that the defendant in error was on duty in charge of a train at the time he was injured, inasmuch as he had been off duty for more than ten hours when he took charge of said train at Cleveland, and had been on duty but about two hours since taking such charge.

It may be claimed by the defendant in error that the entire time from the morning of August 19th, when the defendant in error was first called to deadhead to Ohio Junction, up to the time of the injury on the morning of the 23rd, should be treated as a continuous period. An examination, however, of all the evidence in the record will show that there was no violation of the Hours of Service Act in connection with any of the trips prior to that ending at Warwick on the morning of August 22nd.

The trial court ruled that "deadhead" time should not be included in computing the sixteen-hour period contemplated by the Hours of Service Act. This ruling was in accordance with the holding of the Interstate Commerce Commission in its Ruling No. 74, which is as follows:

> "Hours of Service Law. Employes deadheading on passenger trains or on freight trains, and not required to perform, and not held responsible for the performance of any services or duties in connection with the movement of the train upon which they are deadheading, are not, while they are so deadheading 'on duty' as that phrase is used in the act regulating the hours of labor."

Excluding the deadhead time shown by the evidence, there can be no claim of any violation of the Hours of Service Act, other than a single violation of some thirty minutes at Warwick on the morning of August 22nd; and this is true whether regard be given either

to the provision in the act requiring a ten-hour off duty period whenever the employee has been on duty for a sixteen consecutive hour period, or to that requiring an eight-hour off duty period where the employee has in any twenty-four-hour-period been on duty sixteen hours in the aggregate.

The evidence is undisputed that while the defendant in error was deadheading, as set forth in the record, he was without any responsibility whatever as to the movement or control of the trains upon which he was riding. (Rec., 116; Trans., 55. Rec., 117; Trans., 56.)

In the case of *Osborne's Administrator* v. *C. N. O. & T. P. Ry. Co.*, 164 S. W., 818, decided by the Kentucky Court of Appeals on March 2, 1914, it was claimed that the time between which the deceased had been notified to be in readiness to be upon duty and the time when he actually went upon duty should be computed for the purpose of determining whether the sixteen hour provision of the Hours of Service Act had been violated.

We quote from the opinion in the Osborne case, as follows:

> "The record further shows that when a railroad employe is 'deadheading,' as Osborne was in going from Somerset to Oakdale on the 16th, he does not have any duties whatever to perform in connection with the movement of the train on which he is 'deadheading'; that he really occupies the attitude of a passenger free from any care or responsibility relating to the operation or management of the train. * * *
>
> "The Interstate Commerce Commission, however, has promulgated Rule No. 74, providing that 'employes deadheading' on passenger trains or on freight trains and not required to perform, and not held responsibile for the performance of, any service or duty in connection with the movement of the train upon which they are 'deadheading,' are not

while so 'deadheading' 'on duty' as that phrase is used in the act regulating the hours of labor." This construction, although it does not have the binding force of a court decision, is yet entitled to great weight on account of the important duties this high Commission exercises in administering these remedial federal statutes, and we concur in its soundness when applied to the facts in this case."

It appears from the record herein, that the defendant in error was fully aware of his exhausted physical condition. He knew that he was unfit to assume the charge of a train at Cleveland at midnight on August 22. He did not, however, make this unfit condition known to the plaintiff in error. We refer to the evidence of the defendant in error as same appears upon record pages 130 and 131 (Trans., 63 and 64):

"Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you stumbled or bumped against some other cars on the way down?

A. I bumped up against the car, run into the side of the cars.

Q. That was on your way down to the roundhouse?

A. That was on my way down to the yard office.

Q. To the yard office? And that was the time that you noticed that you were sleepy also?

A. Yes, sir.

Q. That was before you had registered out or taken any train at all?

A. That was after I was called. That was while I was going down.

Q. After you were called and on your way down to the yard office?

A. Yes, sir.

Q. Who did you see at the yard office when you got down there?

A. I saw the yardmaster.

Q. Saw the yardmaster?

A. And the clerk.

Q. And the clerk. Did you say to either of them anything about the fact that you were sleepy?

A. No, sir.

Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?

A. No, sir.

Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?

A. I asked the yardmaster for a pilot, that was all.

Q. For a pilot?

A. Yes, sir.

Q. You told him nothing about feeling tired nor sleepy?

A. I did not.

Q. Told him nothing about having stumbled even?

A. No, sir."

In *Smith* v. *A. T. & S. F. Ry. Co.*, 87 S. W. Rep., 1052 (Court of Civil Appeals of Texas), it appeared that a collision occurred by reason of the failure of the plaintiff, an engineer, to run his engine and train onto a side-track in order to let pass a train going in the opposite direction. The plaintiff engineer charged that his failure to observe that he had reached the switch was on account of the fact that he was in no fit condition to manage said train or to perform his duties as engineer on account of having been continuously and consecutively at work as an engineer for thirty-one hours and twenty minutes without sleep or rest, under orders from the defendant's agents and managers, and on account of which long and continuous work he had become drowsy and sleepy and was at the time he approached said switch so fatigued from the loss of sleep and rest that he fell temporarily into a doze which was unavoidable on

his part on account of the lack of sleep or rest and the continuous service which the defendant railroad had required him to perform; that he continued to perform his duties as long as he could until he was overcome by drowsiness; that he resisted the drowsiness as long as possible for him to do so.

The action was based upon a state statute limiting the hours of service, except in case of casualty, etc. The court, in deciding the case, said:

> "He (the plaintiff) knew his physical condition far better than the railway company could know it, and cannot excuse his carelessness in falling asleep on his engine while it was standing on the main track by the fact that he was requested by the master mechanic to take out a train after he had been at work for about 17 hours. Neither is it any excuse to say that he was detained longer on the trip than he expected to be by the carelessness of a telegraph operator. It may have been a violation of a statute upon the part of appellee to require appellant to work over 16 hours, unless there was actual necessity for it, and in case others had been injured through the violation of law appellee would doubtless be held liable; but appellant voluntarily acted with appellee in the violation of the statute, and will be held to have assumed all risk arising from such act."

In *Schweig* v. *C., M. & St. P. Ry. Co.*, 216 Fed. Rep., 750, the Circuit Court of Appeals for the Eighth Circuit held (752):

> "Plaintiff in error claims that Schweig fell from the engine by reason of being in a tired and exhausted condition, although there is no direct evidence that this is so, and it is very doubtful whether there was sufficient evidence to go to the jury upon this subject (*St. L. I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 33 Sup. Ct., 852, 57 Law Ed., 1179); but we do not determine this question. Looking at the case as presented by the record, regardless of

the Hours of Service Act, and treating the case simply as one under the Employers' Liability Law (35 Stat., 65), it is clear that Schweig assumed the risk of injury by reason of the continuous hours of service, as he knew better than anybody else his own condition, and as to whether he was taking any risk in continuing to work in his then present condition, whatever it was. Therefore the verdict was rightly directed on this view of the case."

So in the case now before this court, if the defendant in error knew that the fourteen-hour off duty period which had been given him immediately prior to the commencement of the Cleveland trip was insufficient to enable him to so recuperate his powers as to be in a fit condition to take charge of a train, he should have notified the plaintiff in error of that fact. The failure to so notify the plaintiff in error was the direct cause of his injury.

He states that he did not himself know just what happened at the time of the injury. We quote from the record (Rec., 143; Trans., 70):

"Q. You do not know whether you struck the side of this car or did not strike it, do you?

A. No, sir.

Q. You do not know whether you slipped or stumbled, do you, you have no knowledge as to that?

A. I know I did not slip nor stumble.

Q. What is it?

A. Off of the footboard.

Q. No, but on the ground?

A. I do not remember after that.

Q. Your last recollection is at the time that you stepped down?

A. Off the footboard.

Q. Did you step with your left or right foot first?

A. I stepped with my left.

Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?

A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?
A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, you don't know?
A. I don't know."

At the time of his injuries, defendant in error was not working in violation of the provisions of the Hours of Service Act; and as such injury resulted solely from his own negligence, the defendant in error is without right of recovery herein. He had no knowledge of the character of the ground between the tracks at the point in question, nor as to the width of space between the tracks. (Rec., 91; Trans., 42.) His conduct in stepping off from the footboard of his moving engine in the dark without signalling his engineer, and attempting to step into a space of which he was entirely ignorant, was not that of a reasonable man.

In the "Motion by Defendant in Error to Dismiss or Affirm, and Suggestions in Support Thereof" counsel, on page 15, stated that the undisputed facts in this case established not only liability under the second count of the plaintiff's declaration, but as contributing thereto a flagrant violation upon the part of the railroad of the sixteen-hour law.

From the testimony of the defendant in error, just above quoted, it is clear that he had no knowledge as to just what caused his injuries, or whether the closeness of the tracks had any connection whatever therewith. There is no direct evidence as to whether the defendant in error stepped from the engine at the side of the car or at the point of junction between the two cars. It ap-

pears, however, that his purpose in getting off was to uncouple the hot-box car from the car next thereto. The inference is therefore more probable that it was at the point of junction between two cars where the defendant in error stepped off. If so, the opening between the two cars made the space into which he stepped even wider than the four feet which he testified was the minimum distance between tracks theretofore noticed by him. It would seem that this inference is justifiable; and as there is no evidence that the closeness of the tracks had anything to do with causing the injuries, it necessarily follows that the negligence of Wilson in undertaking to act as conductor of a train in his tired, sleepy and exhausted condition was the sole cause of his injuries.

Whether we consider the negligence of the defendant in error in undertaking to take charge of the train at Cleveland when he knew that he was incapacitated therefor and could not keep awake, or his negligence in getting off from the footboard of his engine in the manner he did, it is clear in either instance that he brought his injury upon himself. It is no less the duty of an employee to make known to his employer his temporary incapacity to do the work assigned him, than to perform any duties which may be specifically set forth in any book of rules.

The defendant in error should therefore be precluded from recovery because of his negligence, which was alone the cause of his misfortune.

In *Great Northern Railway Company* v. *Wiles, Administrator,* decided by this court on March 20, 1916, and wherein the deceased, a brakeman, upon the train breaking in two, failed to protect the rear of the same by flagging, as was his duty, but instead remained in

the caboose where he was killed by another train running into the caboose, this court said:

> "The Supreme Court (Minnesota Supreme Court) applied the rule of *res ipsa loquitur* and justified a submission to the jury of the negligence of the railway company as a deduction from the pulling out of the drawbar, and the proportion of its causal relation to the death of Wiles to the amount of negligence attributable to him, and reversed the action of the trial court, entering judgment for the company notwithstanding the verdict.
>
> The application of the doctrine to cases like that at bar is disputable. * * * The case at bar is not solved by the doctrine. There is no justification for a comparison of negligence or the apportioning of their effect."

It is respectfully submitted that the defendant in error was not at work at the time in violation of the Hours of Service Act; that his disability was known to him, but unknown to the company; that his injury was the result of such disability, and no recovery can be had therefore.

II.

UNDER THE FEDERAL HOURS OF SERVICE ACT, AS AUTHORITATIVELY INTERPRETED BY THIS COURT, A PROXIMATE RELATIONSHIP MUST BE ESTABLISHED BETWEEN THE INJURY AND THE VIOLATION OF THE LAW, EVEN WHERE, AT THE TIME OF THE INJURY, THE VERY FACT OF CLAIMANT BEING THEN ON DUTY IS VIOLATIVE OF THE LAW.

The mere violation of the Federal 16-Hour Law does not *ipso facto* make the violator thereof an insurer of the safety of the employee after sixteen hours service have expired; nor does the mere violation of such time limit make the carrier responsible in damages for any and all injuries the employee so worked overtime

may, during such overworking time, sustain. There still remains the necessity of showing that the violation in question brought about or proximately contributed to the injury sustained.

In *St. L. I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 57 Law Ed., 1179, the trial court, in its instructions, held that the mere violation of the statute invited the penalty prescribed, and that the offender would not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements; but upon appeal, this court, speaking through the chief justice, in commenting upon such instructions, said:

> "The ruling (of the lower court) was that by operation of law the carrier is an insurer of the safety of all his employes while working beyond the statutory time. * * * In giving to the statute the construction above stated, we think error was committed. The Hours of Service Act was approved March 4, 1907, and is entitled 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.' We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this because, although the act carefully provides punishment for a violation of its provisions nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery, it must be shown that the alleged negligence was the proximate cause of the damage."

In the case now before the bar of this court, there was, at most, as heretofore shown, but a single violation of the Hours of Service Act, namely, the permitting or requiring the defendant in error, Wilson, to be on duty at Warwick in connection with the trip from that point to Newcastle, from 9:30 until 10 o'clock on the morning of August 22nd. There is not, however, any evidence in the entire record showing that this violation of thirty minutes in any manner brought about or contributed to the injury. It is to be noted that defendant in error's injuries occurred some sixteen hours later, and that in the interim he had been afforded an "off duty" period of about fourteen hours.

We are not permitted to go into the realm of speculation and conjecture and blindly conclude that if the defendant in error had been relieved at 9:30 A. M. instead of 10 A. M. he would not have received the injuries in question. During the thirty-minute violative period the defendant in error was not engaged in any strenuous work that might be deemed to have exhausted him physically and mentally for the next sixteen hours. On the contrary, his train was not under movement, its work at Warwick had all been done, and it was standing upon the sidetrack west of the station during all of the period, merely waiting an opportunity to proceed upon its way.

We quote from the record (Rec., 126; Trans., 61):

"Q. All the work at Warwick had been done, and it was ready to proceed, was it?

A. We were ready to go.

Q. Ready to go?

A. Yes, sir.

Q. Then, from 8:40 until the other crew took charge you had nothing to do about that train, did you?

A. I staid there.
Q. Just staid there until the other crew came?
A. Arrived, yes, sir."

It is inconceivable how anyone can claim that it was this thirty minutes of waiting on this sidetrack at Warwick that caused the defendant in error, Wilson, to be so mentally and physically exhausted that he was unable to clearly see and staggered and bumped against the cars in the Cleveland yard some fourteen hours later. The thing is unthinkable. There is no connection either in point of time or otherwise between the violation and the subsequent injury. There being no evidence of any character whatever showing a connection between the violation and the injury, the trial court erred in refusing instruction number 27, tendered by the plaintiff in error, and reading as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the Hours of Service Law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injuries." (Trans., 158.)

The *McWhirter* case is illuminating upon this point. The court said:

> "It requires no reasoning to demonstrate that the general rule is that, where negligence is charged to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. * * *
>
> It is to be observed, however, that even if, for the sake of argument, the broad expressions of the court below and those of the trial court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a

> causal connection between the injury complained of and such *per se* negligence, the concession would not avoid the federal question or remove the error. We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident. * * * Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

Notwithstanding the uncontroverted fact that for at least fourteen hours before going on duty on the trip on which he was injured, Wilson was not "engaged in or connected with the movement of any train," the court permitted the jury to speculate or conjecture whether there was a proximate connection between the fact "that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22nd, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train (plaintiff's instruction 1, Rec., 307; Trans., 153) and the fact that the plaintiff was injured upon a trip which began shortly after midnight on the 23rd day of August, when he was "required and permitted by the defendant to take charge of a freight train" (plaintiff's declaration, Rec., 30; Trans., 14). In other words, the jury were permitted to decide that a period of fourteen hours during which the defendant in error was relieved or not required or permitted again to go on duty was not sufficient, in view of all the facts and circumstances developed before the jury, to com-

ply with the requirements of the statute, which (as interpreted by the court below and by the attorney for the defendant in error) merely fixed a *minimum* period of relief (suggestions of defendant in error, p. 14) but leaves to the fluctuating judgment of different courts and juries the right to determine the extent to which such minimum should be enlarged because of facts and circumstances peculiar to individual cases. According to the ruling of the court below and the contention in this court of counsel for defendant in error, where a jury has decided, in view of the particular circumstances of an individual case that fourteen hours off duty is not sufficient to meet the requirements of the statute, the defendant (plaintiff's instructions 1 and 2, Trans., 152-154) cannot set up either contributory negligence or assumption of risk, although the plaintiff is fully aware of his inability to exercise care commensurate with the hazards of his occupation and does not reveal such disability to his employer who is ignorant thereof.

By the construction given by the lower court to the Hours of Service Act, ten hours is fixed as the *minimum* time off duty after sixteen hours of continuous service, but if the continuous service exceeds the period of ten hours, then the minimum off time expands elastically to cover and include the number of hours in addition to the ten hours which different juries may think different situations require. To thus permit a jury, in the exercise of its judgment and discretion, to extend a statute so as to eliminate the common law defenses of contributory negligence, and assumed risk destroys the manifest purpose of Congress as set forth in the statute and renders impossible a uniform application of the statute.

In support of our contention that there must be evidence to show a proximate relationship between the vio-

lation of the statute and the subsequent injury we call attention to the opinion of this court in the case of *A. T. & S. F. Ry. Co.* v. *Swearingen,* decided December 13, 1915, wherein it appeared that the plaintiff, while acting as a fireman, had been kept upon duty for more than sixteen hours, and while subsequently doing some oiling according to directions, fell from the running board of the pilot and was injured. There was evidence of negligence upon the part of the railroad company, but the defendant set up that the plaintiff was guilty of contributory negligence and had assumed the risk. This court, speaking through Mr. Justice Holmes, said:

> "The only matter that we have to consider here is an instruction given to the jury touching the effect of keeping the plaintiff on duty overtime upon these matters alleged by the defense.
>
> The delay that led to keeping the plaintiff on duty too long was caused by the breaking of a valve yoke, and a part of the charge was as follows: 'If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to be guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in anyway be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt.
>
> The last half of this instruction was excepted to

in the presence of the jury, but the charge was not modified. It was the one instruction specifically directed to the matter of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than sixteen hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defenses of contributory negligence and assumption of risk in such a case is not the hours of labor act itself, but the subsequent Employers' Liability Act of April 22, 1908, C. 149, Sections 3, 4; 35 Stat., 65, 66. The latter has that operation only when the breach of the law contributes to the injury. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S., 265, 279, 280. We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case."

III.

BY THE HOURS OF SERVICE ACT CONGRESS HAS LEGISLATIVELY DETERMINED THE BOUNDARIES OF THE EMPLOYER'S LIABILITY FOR INJURIES CAUSED BY PERMITTING EMPLOYEES TO BE ON DUTY AN EXCESSIVE NUMBER OF HOURS.

The rule with reference to the proper construction of the Hours of Service Act must, we believe, be the same as that applicable to the Federal Employers' Liability Act. This rule has been well stated in the opinion rendered by the Supreme Court of Illinois in the case of *Staley* v. *Illinois Central R. R. Co.*, 268 Ill., 356, from which we quote (377) as follows:

"The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal Government. Necessarily all common or statute law of this state on that subject has been superseded. The field of liability as to em-

ployes injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability Act—and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

The Hours of Service Act covers every moment in which an employee is "actually engaged in or connected with the movement of any train" either by its requirement as to time "on duty" or its requirement as to time "off duty" antecedent to being thus "actually engaged in or connected with the movement of any train." It follows that to justify a claim that a violation is the proximate cause of an injury, such injury must have occurred at a time when the statute was being violated. If, as we have endeavored to point out, the plaintiff in error did not violate the Hours of Service Act by permitting the defendant in error, Wilson, to again go on duty at midnight on August 23rd, then there was no violation of statute suspending the defense of assumed risk, and Wilson's inability to perform the duty of his dangerous occupation with a degree of care commensurate with the hazard of that occupation, known to him but not communicated to his employer, defeats recovery.

The risk and hazard of "again going on duty" in the condition which Wilson so clearly understood, and in his testimony so accurately describes, was voluntarily assumed as a matter of law, and the legal consequence of such assumption can be escaped only on one condition, namely, that the statute forbade this assumption of risk by forbidding that he be again permitted "to go on duty" at the time in question. That condition, however, is wholly lacking in this case; but notwithstanding, the court permitted the jury (and the jury exercised the permission) to overrule the legislatively declared judgment of Congress that ten hours off duty is legally

a sufficient intervention to break the causal connection between previous overwork and subsequent injury.

By thus being permitted to hold that the thirty minute violation of the statute "from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913" (plaintiff's instruction, Trans., 152), proximately contributed to an injury which occurred on August 23, contributory negligence was eliminated from the case; and further, assumed risk was eliminated by plaintiff's instruction 2. (Trans., 152.)

In this connection the attention of this court is called to the case of *Erie R. R. Co.* v. *New York*, decided by this court and reported in 233 U. S., 671; 58 Law Ed., 1149, the question there involved being whether the State of New York by legislative enactment could prescribe a different day's work for block system, telegraph and telephone operators and signal men on railroads than that prescribed by the Federal Hours of Service Act. This court held that the Federal Hours of Service Act had completely covered the entire field relating to hours of labor of railroad employees connected with the movement of trains, and that the rights as well as the duties and responsibilities of carriers subject to that act must be found in the language of the act itself. This court said:

> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroad. It is induced by the public interest of safety, and the 'hours of service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

Counsel for the defendant in error in the "Motion by

defendant in error to dismiss or affirm, and suggestions in support thereof," upon page 14, commenting upon the Hours of Service Act, says:

> "There is no relationship presented between ten hours' rest and other periods 'on duty' in excess of sixteen hours. It is not contemplated by the act that ten hours rest following thirty or forty or more hours on duty renders a railroad company immune from government prosecution or civil liability for the law's violation."

It is respectfully submitted that this conception of the intent of the Hours of Service Act is radically wrong. The act, we believe, covers the entire field of the time during which an employee is engaged in the train service in interstate commerce. If, however, we are wrong in this position, and counsel for defendant in error is right, then there is no statutory provision whatever covering the length of "off duty" time which must be given an employee who has been on duty *more* than sixteen hours before he is again legally eligible for further service; and if there be no statutory provision covering "on duty" time in excess of sixteen hours, then any injury which might be sustained by the employee as the result of having been compelled or permitted to be on duty in excess of sixteen hours, could be redressed only under the provisions of the Federal Employers' Liability Act; but in such instance, there being no violation of the Hours of Service Act, the defense of assumption of risk as a bar would remain to the employer, and contributory negligence would have to be considered in diminution of damages.

Respectfully submitted,

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